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SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER _____

Supreme Court, U.S.
FILED

NOV 17 1986

JOSEPH F. SPANIOL, JR.
CLERK

JIMMY BOYD
Petitioner

VERSUS

McNEILAB, INC.
Respondent

On Appeal From the United States District Court,
Eastern District of Louisiana, State of Louisiana,
Honorable Morley L. Sear, Judge Presiding

JURISDICTIONAL STATEMENT AND
APPLICATION FOR WRIT OF REVIEW AND/OR
CERTIORARI TO REVIEW THE DECISION
OF THE FIFTH CIRCUIT COURT OF APPEALS

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Attorney for Jimmy Boyd

12/8/86



QUESTIONS PRESENTED

Is the granting of summary judgment based on "lack of evidence", an evidentiary factual finding prohibited by the Seventh Amendment?

LIST OF INTERESTED PARTIES

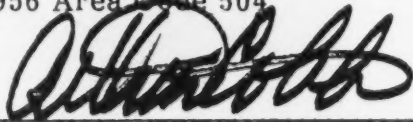
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

Jimmy Boyd, Petitioner
Arthur Cobb, Attorney for Petitioner

McNeilab, Inc. d/b/a McNeil
Pharmaceutical, Respondent
Richard B. Eason, Attorney for Respondent

By Attorney for Plaintiff

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A handwritten signature in dark ink, appearing to read 'Arthur Cobb', is written over a horizontal line.

ARTHUR COBB, Trial Attorney

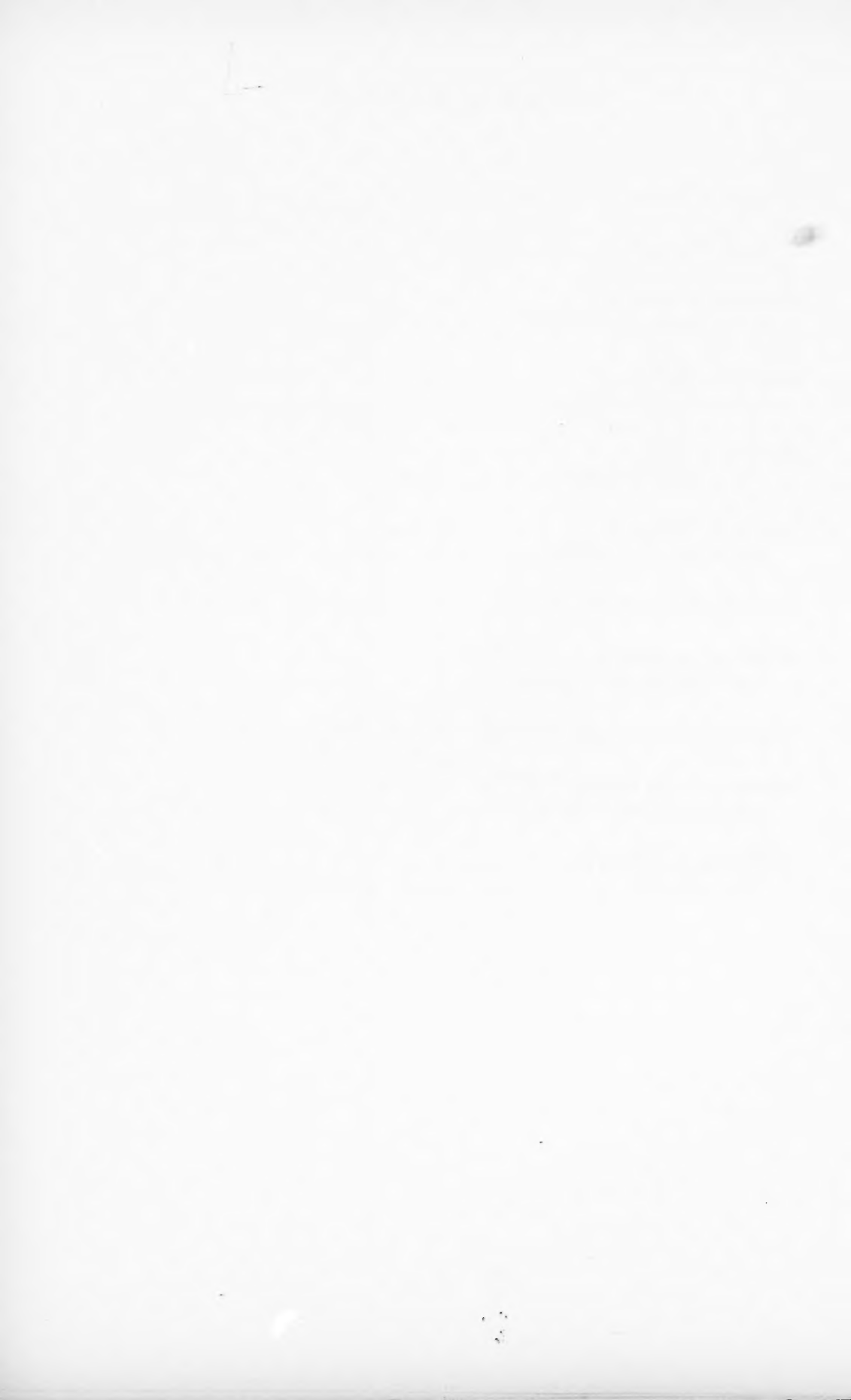
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LOWER COURT ACTION

The lower court granted defendant's motion for summary judgment on the grounds that defendant had more evidence, and the Fifth Circuit affirmed.

JURISDICTIONAL GROUNDS IN THIS COURT

The Judgment of the Fifth Circuit is dated 23 May 1986. The time of entry is 23 May 1986. The Statutory Provisions granting jurisdiction in this Court are:

28 USC 2101(c):

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Seventh Amendment:

AMENDMENT [VII.]

Civil trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Supreme Court Rule 17(1)(a):

Rule 17. Considerations governing review on
certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important rea-

sons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Plaintiff claimed personal injury by the ingestion of the drug Zomax. He had an expert pharmacologist and toxicologist's opinion that the drug was defective and that the defendant manufacturer failed to warn of the dangers. The trial court granted defendant's motion for summary judgment on the inadequacy of plaintiff's Expert's Affidavit. The Fifth Circuit affirmed.

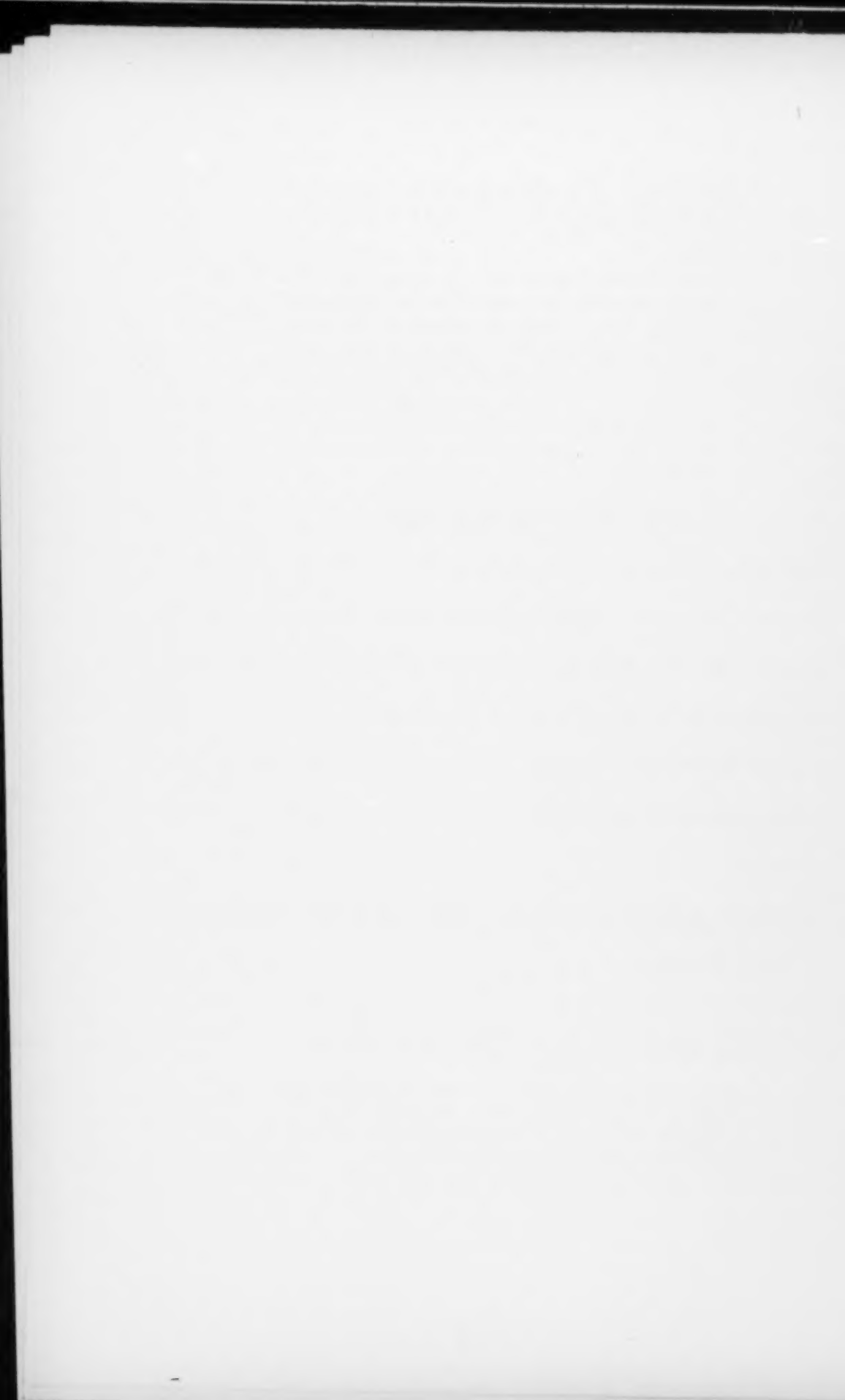
FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

28 USC 1332(a)(1):

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;



ARGUMENT

The United States Constitution, Amendment 7, provides that "the right to trial by jury shall be preserved". This language emphasizes the continuing protection of the Constitution. Judges may not invade the province of the jury.

Every motion for summary judgment should be scrutinized with utmost care. **Mandel v. U.S.**, 719 D.2d 963 (1983).

The idea that summary judgment is a drastic alternative and that reference should be given to full trial on the merits is strongly supported by the jurisprudence. **Ozark v. Allied**, 480 F.2d 1014 (1973).

A problem arises, however, because the trial judge often places himself in the capacity of weighing **factual** data for evidentiary purposes.

It should be asserted that in jury cases, the judge is not to try issues of fact. See **Warrior v. M/V NAN FUNG**, 695 F.2d 1294 (1983).

In a manufacturer's products liability action involving a prescription drug, as is the situation in the present case, the

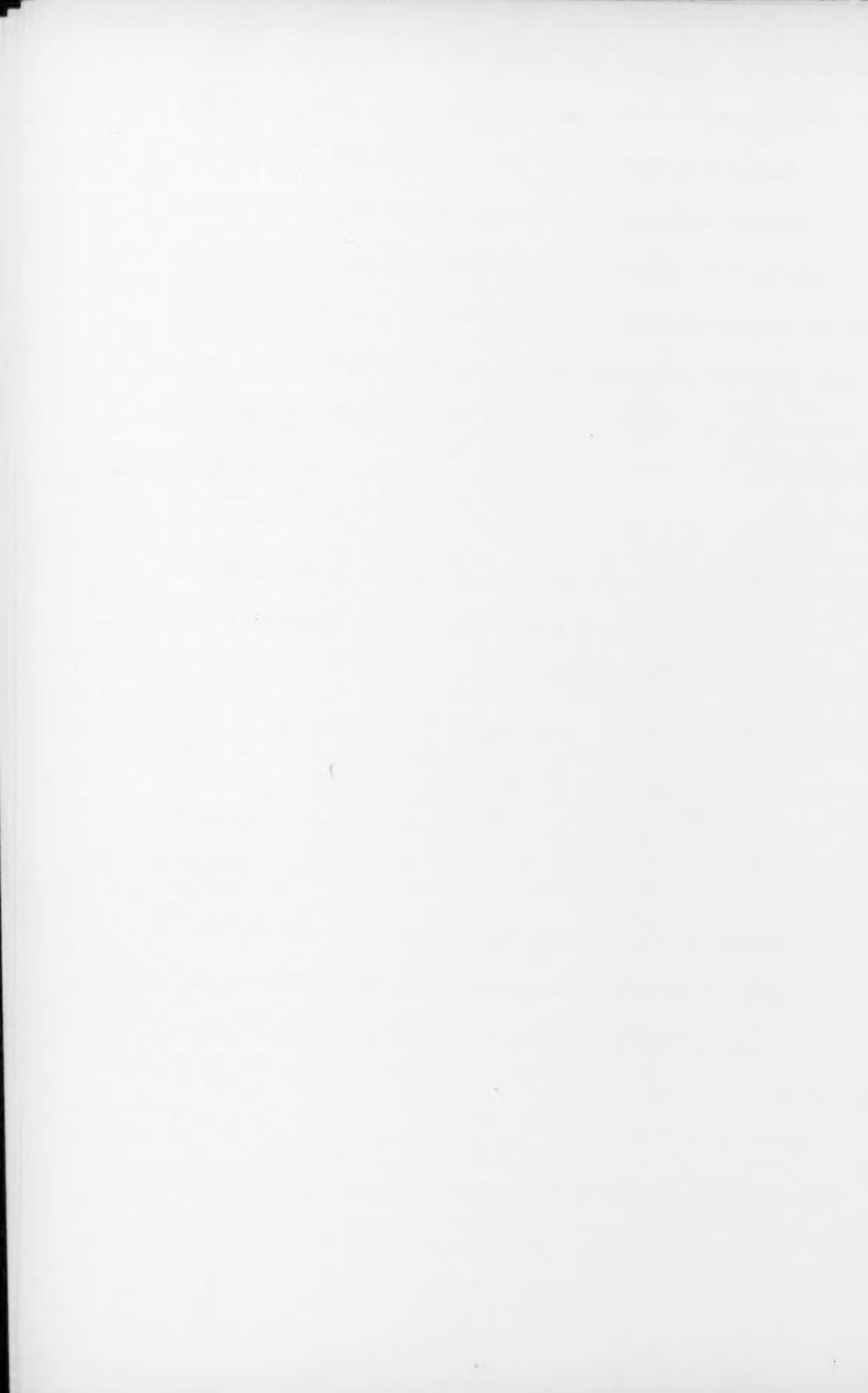
elements of causation and adequacy of warning are factual determinations and are therefore questions to be left to the jury. **Bernotas v. Harley**, 543 F.Supp. 519 (1982) re causation, and **Williams v. Lederle**; 591 F.Supp. 381 (1984); and **Stephens v. Searle**, 602 F.Supp. 379 (1985) re adequacy of warning. Even where parties may contend that facts are undisputed but that different **inferences** may be drawn, summary judgment is inappropriate. **Warrior v. M/V NAN FUNG**, 695 F.2d at 1296-1297.

As in the present case, weighing affidavits of the Experts as to their probative value was inappropriate. **Warrior v. M/V NAN FUNG**, 695 F.2d at 1299.

District court's function, in summary judgment proceeding, is not to resolve factual issues but to determine whether there exists a genuine issue of material fact, and in making its determination, court may not weigh conflicting affidavits to resolve disputed fact issues.

The proper course for the judge is to view the conflicting affidavits as generating a genuine factual dispute and leave the matter to trial on the merits See **Magill v. Gulf**, 736 F.2d at 979.

Mr. Boyd is not arguing the constitutionality of Rule 56 when it is applied properly. Here, Rule 56 was not applied properly.



Rule 56 should be applied only as to **questions of law**. In this case, Rule 56 was applied as **questions of fact**. Mr. Boyd **does** question the constitutionality of Rule 56 as to questions of fact.

Whenever a court rules that there is "lack of evidence" (i.e., that the "evidence" preponderates 51% vs. 49%, or 99% vs. 1%, or even 100% vs. 0%), the court is ruling on the **facts**. The Seventh Amendment mandates that the jury decide the **facts**.

Rule 50 can constitutionally be applied **only** as to questions of law.

CONCLUSION


The Seventh Amendment is a **prohibition** against **Judges** and holds down the authority and power of the **Judges**, yet it is the very same **judges** who interpret the Seventh Amendment and who are **reluctant** to tie their own hands with the provisions of the Seventh Amendment. These Judges have found ways to read FRCP 56 in such a way as to allow the **facts** presented to them via Affidavits to be decided by them summarily without being presented to a Jury. Rule 56 allows summary judgment as a matter of law only - otherwise, it would contravene the Seventh Amendment.



Here, the District Court and the Fifth Circuit Court of Appeals has so far sanctioned such a departure from the true meaning of the the Seventh Amendment that such a departure (summary judgment **on facts**) conflicts with a Constitutional Amendment and this Court is called upon to exercise its power of supervision.

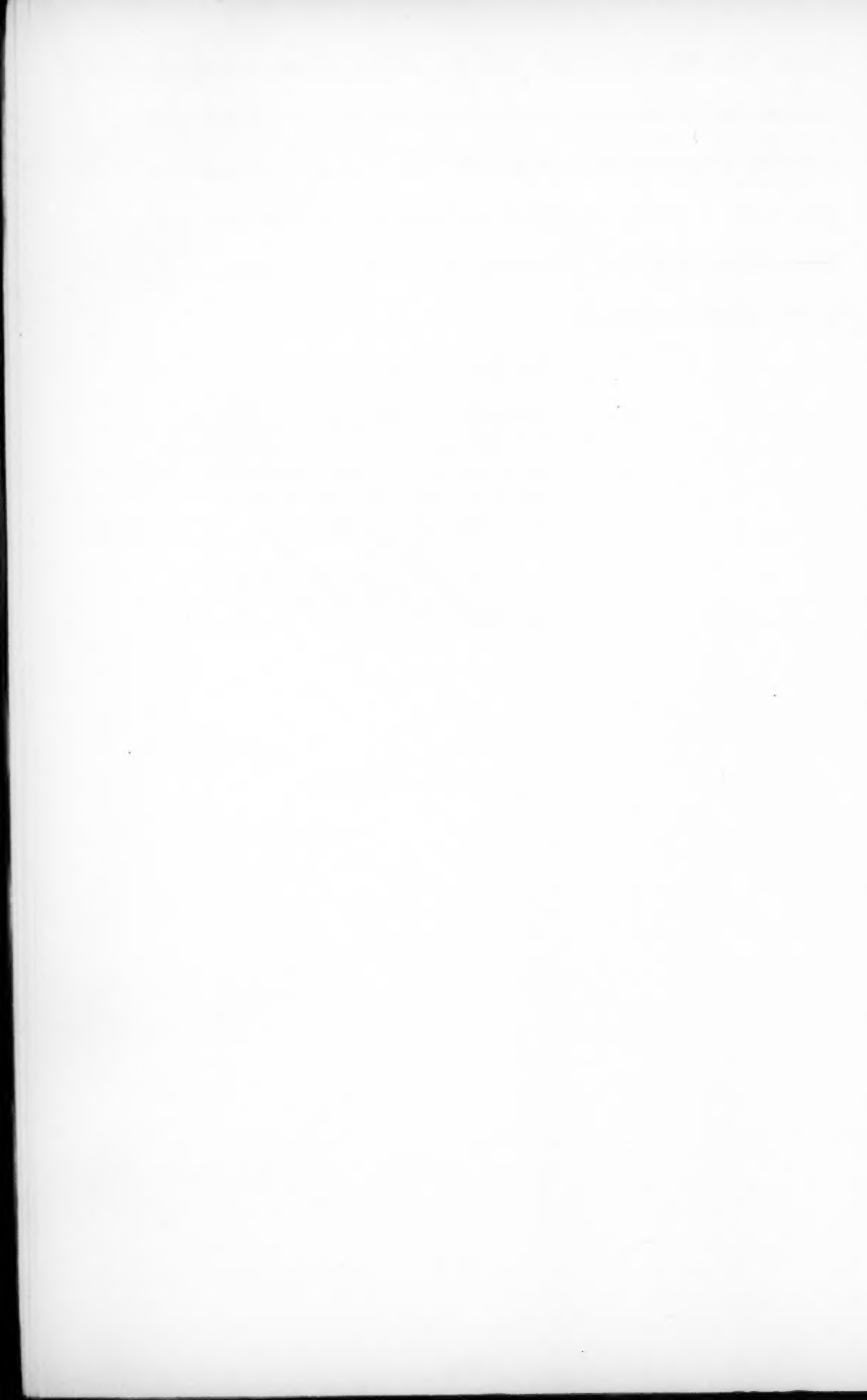
Respectfully Submitted:

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ARTHUR COBB, Trial Attorney

BEST AVAILABLE COPY



CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared ARTHUR COBB, who, after first being duly sworn by me, did depose and say that the allegations of the Petition for Writ of Review and/or Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same has been mailed to Richard B. Eason, II on 13 November 1986.



ARTHUR COBB

SWORN TO AND SUBSCRIBED before me on 13 November 1986.


NOTARY PUBLIC

86-798

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SUPREME COURT OF THE UNITED STATES

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JIMMY BOYD
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VERSUS

McNEILAB, INC.
Respondent

On Appeal From the United States District Court,
Eastern District of Louisiana, State of Louisiana,
Honorable Morley L. Sear, Judge Presiding

APPENDIX

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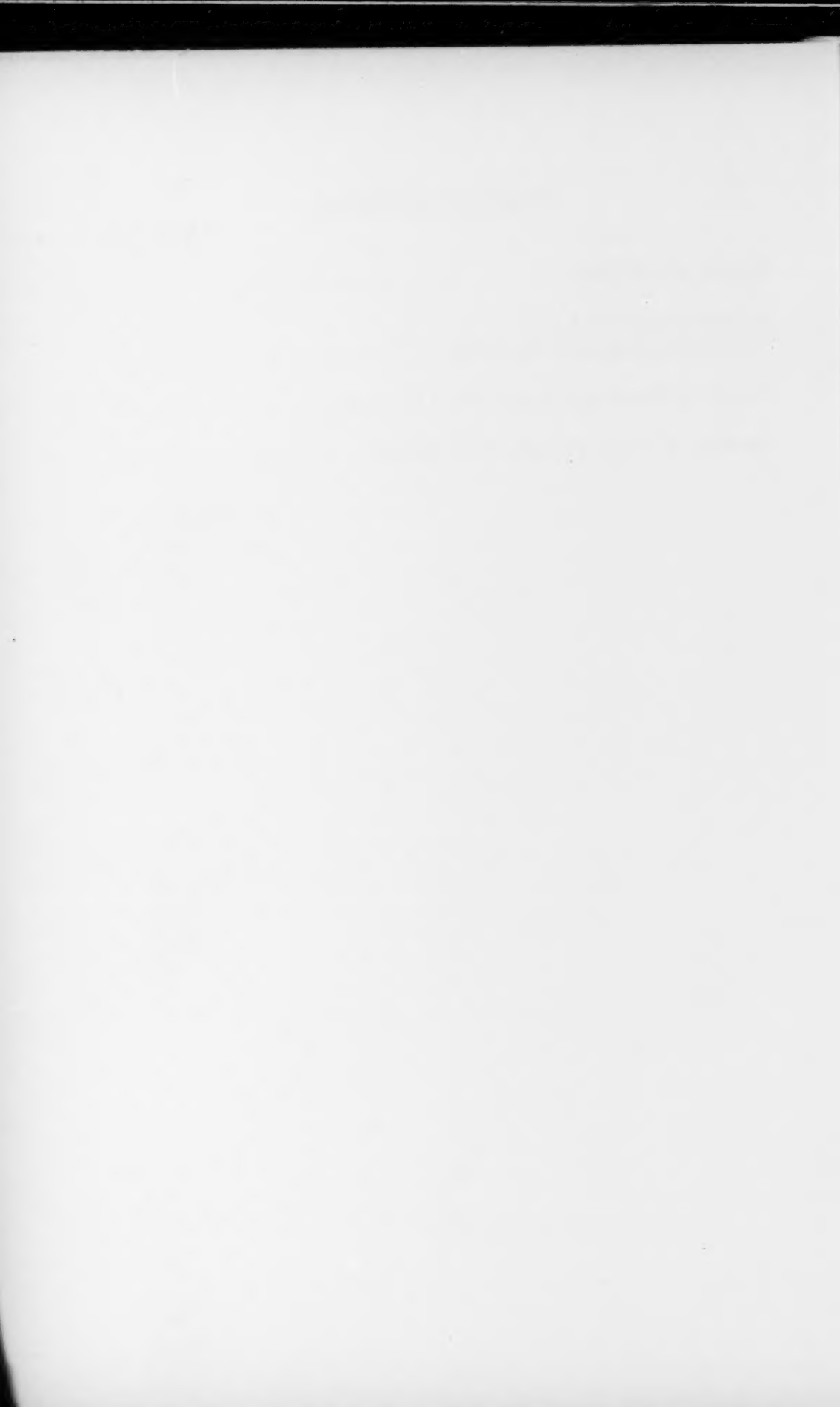
Attorney for Jimmy Boyd

UPP

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 19, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 86-3138 - Boyd vs. McNeilab

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

etc.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: _____
Deputy Clerk

cc: Mr. Arthur Cobb
Messrs. Richard B. Eason, II
Henry B. Alsobrook, Jr.



JIMMY BOYD * CIVIL ACTION
 *
VERSUS * NUMBER 84-1582
 *
McNEILAB, INC. * SECTION "G"(3)

PLTF ARTHUR COBB, ESQ

DEFT RICHARD EASON, ESQ

REPORTER: TOM MASSEY

COURTROOM DEPUTY: VIC BUCCOLA

JUDGE MOREY L. SEAR PRESIDING

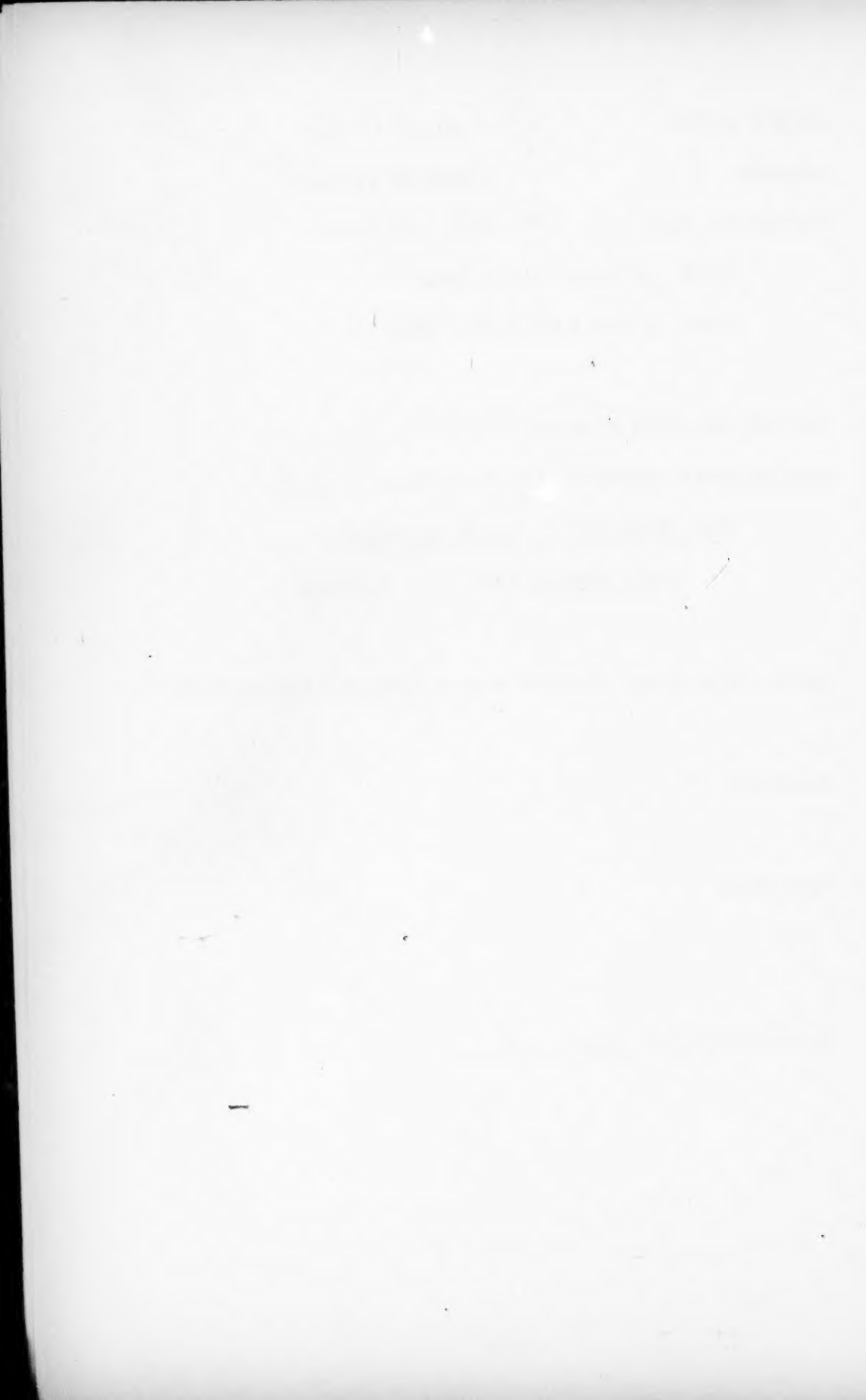
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DEFT (MCNEILAB, MOTION FOR SUMMARY JUDGMENT)

ARGUED

GRANTED

DATE OF ENTRY FEB 6 1986



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3138
Summary Calendar

JIMMY BOYD,
Plaintiff-Appellant
versus
McNEILAB, INC., et al
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

(August 19, 1986)

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

JOHNSON, Circuit Judge:*

Plaintiff James Boyd appeals from the district court's
summary judgment in favor of the defendant McNeilab, Inc.
We affirm that judgment.

*Local Rule 47.5 provides: "The publication of
opinions that have no precedential value and merely decide
particular cases on the basis of well-settled principles of law
imposes needless expense on the public and burdens on the
legal profession." Pursuant to that Rule, the court has
determined that this opinion should not be published.



I.

While recovering from an oilfield accident, James Boyd used the prescription analgesic Zomax. Boyd alleges that as a result of ingesting Zomax, he sustained a variety of physical problems. Boyd filed the instant strict products liability suit against the manufacturer of Zomax, McNeilab, Inc., alleging that (1) Zomax was defective and that (2) McNeilab had failed to provide adequate warnings regarding the dangers associated with Zomax.

After conducting extensive pretrial discovery, McNeilab filed a motion for summary judgment. According to McNeilab, the undisputed summary judgment proof established that it had properly warned the medical community regarding the potential dangers and side effects associated with the use of Zomax. McNeilab argued in the alternative that the undisputed summary judgment proof established that Zomax was not the cause of Boyd's alleged physical problems. In support of its motion, McNeilab produced sworn affidavits and deposition testimony of a number of physicians, including the physicians that treated Boyd.



In response, Boyd produced the affidavit of a pharmacist, James O'Donnell. O'Donnell's affidavit stated:

Affiant has reviewed the medical records and depositions, etc. that were provided to him regarding Jimmy Boyd. After reviewing this information, affiant has come to the conclusion that Zomax pills prescribed for and taken by Mr. Boyd were defective in that they posed serious risks of injury to the consumer, which information was not adequately disseminated.

It is affiant's further opinion that McNeilab, Inc. was negligent in allowing this product to be marketed and that the injuries and damages to Jimmy Boyd would appear to have been causally related to the Zomax he ingested.

Record Vol. II at 501. Boyd produced no other summary judgment proof regarding the adequacy of McNeilab's warnings. Boyd's remaining summary judgment proof dealt with the issue of causation.

After conducting a hearing, the district court granted summary judgment in favor of McNeilab. Boyd appeals.

II.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate where no genuine issue exists regarding any



material fact and the moving party is entitled to a judgment as a matter of law. This Court has held that "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." **Galindo v. Precision American Corp.**, 754 F.2d 1212, 1216 (5th Cir. 1985) (citing C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure: Civil 2d §2738 [1983]). This is true even where the movant who seeks summary judgment cannot demonstrate contrary facts by specific affidavit recitation. **Fontenot v. Upjohn Co.**, 780 F.2d 1190, 1192 (5th Cir. 1986). See also **Shaffer v. Williams, et al.**, No. 85-1582, slip op. at 6775 (5th Cir. July 21, 1986) (Conclusory allegations supported by conclusory affidavit will not suffice to require a trial even where the movant who seeks summary judgment cannot demonstrate contrary facts.).

Louisiana law requires Boyd to establish, as an essential element of his strict products liability claim against McNeilab, that the Zomax he ingested contained a defect which rendered it unreasonably dangerous. See generally **Kinney v. Hutchinson**, 468 So.2d 714, 718 (La. App. 1985).



According to Boyd, Zomax was defective because it was marketed by McNeilab without adequate accompanying warnings. A prescription drug manufacturer's duty to warn generally extends only to the prescribing physician who serves as a "learned intermediary" between the manufacturer and ultimate user.¹ In **Cobb v. Syntax Laboratories, Inc.**, 444 So.2d 203, 205 (La. App. 1983), the court stated that:

The manufacturer of a prescription drug has the obligation to inform the prescribing physician of any potentially adverse side effects or risks from the drugs use....The manufacturer has no duty to warn the consumer directly of any risks or contraindications associated with the drug. The manufacturer of the drug has fulfilled its obligation when it has informed the prescribing and treating physicians of the risks of harm from the drug so they may intelligently decide on its use and advise the patient.

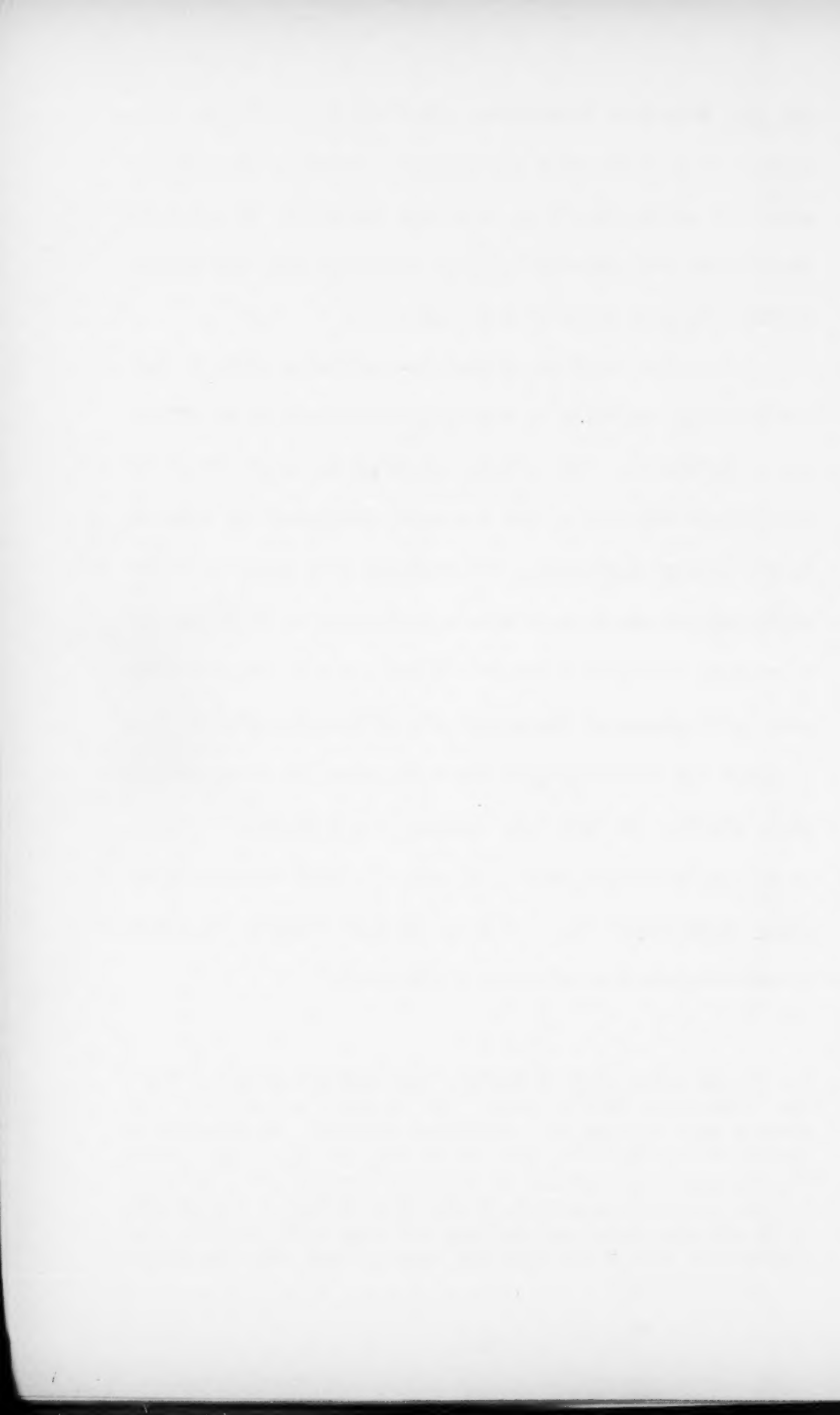
1. This is not a case where Boyd was provided Zomax by someone other than a prescribing physician. Compare **Reyes v. Wyeth Laboraroties**, 498 F.2d 1264, 1276-77 (5th Cir. 1974).



See also **Kinney v. Hutchinson**, 468 So.2d 714, 717 (La. App. 1985). Thus while Boyd has produced evidence that Zomax was not accompanied by warnings directed to ultimate consumers, the absence of such warnings did not render Zomax defective under Louisiana law.

Boyd has failed to produce any evidence relating that the warnings furnished by McNeilab to prescribing physicians were inadequate. The undisputed summary judgment proof established that Zomax was marketed with warnings directed to prescribing physicians. The only summary judgment proof regarding the adequacy of warnings advanced by Boyd was the conclusory affidavit of James O'Donnell stating that warnings were not "adequately disseminated". O'Donnell's affidavit fails to state the evidence upon which he based his conclusion or even whether he has ever examined the Zomax warnings. Moreover, O'Donnell fails to identify why the Zomax warnings were insufficient to create a factual dispute regarding whether Zomax was defective as marketed.²

2. Boyd's claim that McNeilab "negligently" failed to warn the consuming public about the dangers associated with Zomax does not require a different analysis. As observed in *Miller v. Upjohn Co.*, 465 So.2d 42, 45 (La. App. 1985), "[a]lthough strict liability in products liability cases exists in normal circumstances independent of a finding of negligence, it is at the point of warning of drug side effects that negligence and strict liability became one and identical." (citation omitted).



Neither Boyd nor the summary judgment proof has specified any other defect that would render Zomax unreasonably dangerous.³ The judgment of the district court is, therefore,

AFFIRMED

3. We do not reach the issue of whether Boyd's summary judgment proof was adequate to create a factual dispute on the issue of causation.